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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re EDWARD M., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. EDWARD M., Defendant and Appellant.	A120799 (Contra Costa County Super. Ct. No. J04-01120)

The juvenile court in Merced County found wardship jurisdiction (Welf. & Inst. Code, § 602, subd. (a))[1] over Edward M., age 12, and older brother Conrad M., mainly for violent sex offenses they committed against other juveniles while dependents in a group home in that county. The court then transferred the cases for disposition to Contra Costa County, the boys' county of residence, which accepted the transfer. At a dispositional hearing for Edward on January 3, 2008, the court vacated his dependency, declared wardship, and committed him to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF), formerly known as the California Youth Authority (CYA). Edward appeals the dispositional order, claiming abuse of discretion due to lack of probable benefit from the placement. We affirm.

[1] Unspecified further section references are to the Welfare and Institutions Code.

BACKGROUND

The jurisdictional offenses are two counts of felony forcible sodomy in concert (Pen. Code, § 286, subd. (d), one count of felony forcible sodomy (*id.*, § 286, subd. (c)(2)), and two counts of misdemeanor battery (*id.*, § 242). Since no challenge is raised to the jurisdictional findings, we summarize them succinctly.

All offenses occurred in June 2007 at Creative Alternatives, a Merced County group home where Edward and Conrad (then ages 12 and 15) were placed with other youths as juvenile court dependents. The petition anonymously designated three victim dependents in the sustained counts as numbered "confidential victims," and we preserve their anonymity here by referring to them as V1, V2, and V3.

V2 was 16 years old, autistic, mentally retarded, and suffering from paranoid schizophrenia. He was occasionally unsure of who did what to him, but we resolve such matters in favor of the findings. Edward, his brother Conrad, and V3 (age 16) harassed V2 daily, calling him names and threatening him with sodomy. Around 1:15 a.m. on June 18, 2007, Edward, Conrad, and V3 came into his room and woke him. As V2 lay prone on the bed, V3 held down his legs and Edward and Conrad held down his arms. Edward said "Let's grab his ass" and "Let's rape this nigger." As Conrad held V2's mouth so he could not scream, Edward pulled down V2's pants and sodomized him for about 10 minutes. So did Conrad, who ejaculated. In the course of the attack, V2's buttocks was prodded with a foot-long shank Edward held that had a blue pen attached. This was evidenced by blue marks and scratches found on V2's buttocks and around his anus. The shank (a sharpened screwdriver with a taped-on pen) was found secreted under Conrad's mattress. A similar but shorter shank, sharpened but without a pen attached, and which Edward said he always carried in his pocket, was found under Edward's mattress.[2]

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[2] There were conflicting accounts of which shank belonged to whom. On a tape recording surreptitiously made by the frightened V2 in an effort to get someone at the group home to "care," Edward threatens, the night before the sodomy, "When you get to sleep, he's going to get you from behind."

In a second incident, earlier that June, Edward and V3 entered V1's bedroom, where V3 forcibly sodomized V1 and perhaps forced him to orally copulate V3 (a fact denied by V3). V3 was a victim because, according to him, he initially refused demands of Edward and Conrad to orally copulate V1, at which point the brothers got angry and "decided to burn us." Edward heated the head of his shank with a lighter and then burned both victims with it. The burns left scars. V3 said he then participated in the forced sex with V1 out of fear and that Edward held a shank to his throat.

V3 was also a victim in the other sodomy (upon V2) because, he said, he participated due to fear of Edward and Conrad after being burned with the sharpened shank. After the attack on V2, Edward and Conrad warned V3 not to say anything or they would "shank" him when he "went to sleep."

When confronted with the assaults, Edward gave varying and conflicting stories, denying it, saying he was away from the home at the time, blaming V3 for it, or later telling probation that, because he was a Norteño gang member, he was being falsely accused by V3, who was a rival Sureño who never liked him.

The probation report prepared for disposition chronicles a chronically troubled family history marked by parental neglect and abuse, with a chain of 31 child welfare referrals that began in 1994, the year before Edward was born. Both parents had criminal histories and ongoing offenses, the mother's mainly drug- and theft-related, the father's marked by domestic violence. This led to brief legal guardianship under the paternal grandmother, who turned out to have criminal problems of her own, and then dependency placements for Edward in three foster homes and, within the six months just preceding the offenses here, three group homes.

Edward reported having first experimented with alcohol at age nine, and with marijuana at about the same time, selling it to support his habit. He denied recent use of alcohol or other drugs, however. He was in good physical health, but had poor relationships with his peers in the programs, and did not want to follow rules or participate in educational or group home chores. At his most recent group home, he had expressed and behaved in a sexually inappropriate manner, and displayed an antagonistic

attitude toward others. He was "described as being emotionally disturbed." He also assaulted others, threatened staff, and played with lighters or matches. He once started a fire in a field in Bay Point and had been caught in the group home setting having spread butane or lighter fluid on a mattress, and having scorched a wall near his bed.

Edward had been removed from a maternal aunt's home in late 2006, after the aunt found him lying on top of a three-year-old cousin with the cousin's underpants down, and the aunt convinced he had penetrated the younger child with his penis. Since his detention and transfer to Contra Costa County, Edward had received negative write-ups for misbehavior, disrespecting staff, and being kicked out of school. Despite Edward's own reports of being a Norteño and laying the blame for the sodomy charges on being falsely accused by Sureños for gang retaliation, he had no gang problems during detention, and no marks, scars or tattoos indicating gang affiliation.

The report summarized: "[Edward is] described in past reports by group home staff as victimizing other residents who are weaker. This is of grave concern to probation due to the fact that the minor can continue to victimize others if effective intervention is not attempted. It is not recommended that [he] be placed back into the community without receiving intensive services to deal with his bullying and predatory behavior of victimizing others sexually. [¶] [He] is young and this is of concern. [DJF] does not believe that they are able to address his needs. However, the community's safety is imperative. [He] has the ability and sophistication to victimize and threaten others and thus should be involved [in] treatment and receive consequences. [¶] The minor does not admit wrongdoing for his actions and denies responsibility in this matter. He shows no remorse for the victim and believes that co-responsible [V3] was trying to 'get back' at him because they belonged to different gangs. [¶] [Edward] has experienced childhood neglect and although he is denying any type of sexual abuse it is evident that he is in need of therapeutic services to deal with sexual, mental, and physical abuse he may have experienced. His background reveals dysfunctional and abusive parents and guardians. He has a history of being disruptive, substance abuse, disrespecting staff and rules, and sexually acting out towards others. [He] has special education needs. [¶] The minor has a

multitude of treatment issues and needs, which cannot be addressed through placement at this time. While it is unfortunate and disturbing to view a 12-year-old young man in this light, the safety and well being of the community is of paramount concern."

The court ordered a psychological evaluation, and a report of December 12, 2007, was provided by psychotherapist Arthur Paull, based on background materials and four interviews with Edward His report (the Paull report) gave a risk assessment and considered dispositional options of residential treatment, outpatient treatment in a community–based program, and DJF. In discussions about the committing offenses, Edward was able to recall details of both incidents, yet would directly deny any memory of them, trying to conceal his culpability. In discussing his family history, Edward could similarly relate events but could not "begin to describe the chaos and apparent neglect that occurred during the first nine years of his life," as revealed by agency reports dating back to 1994 of extensive criminality, neglect and abuse by the parents. The report noted that since 2004 Edward had been in short-term placements that included three foster homes in the Bay Area, then three group homes in Turlock and Merced. Edward's account of personal behavior revealed "striking" differences from the records, with Edward downplaying or denying alcohol abuse and sexual misconduct.

A two-part risk assessment completed and described by Paull revealed a "static factors" component of 50 percent and a "dynamic factors" component of 95.8 percent, producing an overall risk of 69.6 percent risk, i.e., "a medium to high risk in engaging in another sexual offense." The re-offense risk would vary given such factors as "ongoing caretaker stability, structured daytime activity, participation in sex offender treatment, [and] placement in an appropriate school setting . . . ."

Paull concluded: "[Edward] presents a particularly worrisome profile. He appears to be the product of considerable if not profound neglect and abuse which occurred in his very early years. He has not in any way had the benefit of a stable loving home situation. Over time he has developed a strongly antisocial pattern of thinking and behaving which includes a series of very serious behavioral incidents in the most recent placements where he has resided. [He] has also not been able to succeed in an academic environment and

my suspicion is that these difficulties may have some roots in a possible learning disorder. In addition, [he] has very little if any awareness or insight into the problems that he is experiencing and displaying. In the interviews he presented with a very guarded and steely affect and seemed to have considerable difficulty establishing any rapport with me. In addition there was a kind of vacant quality about him, as if only a portion of him was in the room This presentation may be part of a larger disassociative quality in him. [¶] I was particularly worried by [his] lack of admission or accountability regarding his sexual offenses or past inappropriate sexual behavior. He gave no hint of being at all culpable in the events of June of this year and he could not admit to other sexual behavior problems that he had displayed in earlier placements. If [Edward] is to obtain any benefit from sex offender treatment, he will need to begin to be more trusting in the treatment situation and be able to admit to some of these problems."

Paull "strongly recommended against" community-based placement, writing: "During a series of six community-based placements over the last two years, he has demonstrated that he is unable to control his behavior and [poses] a risk of both physical and sexual assault against peers and perhaps against the community at large. [He] needs to be in a secure custodial setting where there is substantial security and where there can be the protection of others against any possible assault by him."

The "most appropriate choice," Paull felt, was a program of focused adolescent sex offender treatment "delivered in a secure residential facility"—a large program with an "extensive regime of behavioral treatment," ideally with an on-site school. Martin's Achievement Center in Sacramento was an example. Edward's critical and vulnerable stage of development, as a 12-year-old beginning adolescence, required changing "his pattern of thinking, feeling and behaving," or he "could easily become a serious menace to the society at large." Such a placement would be "a kind of last chance," since further crimes by Edward could "easily" make him a candidate for DJF. Paull was concerned that a DJF placement could "further criminalize" him and return to the public "an even more dangerous person than he is now. Such a possible scenario makes even more urgent the need for placement in a large and secure residential treatment program."

The probation report, dated almost three weeks after the Paull report, disclosed that Edward had been screened on December 26 for a residential treatment program and "found inappropriate for placement due to the serious nature of this offense." On December 28, Edward had also been "screened with the [DJF] intake representative. The minor was not found suitable to a commitment due to the minor's age and lack of maturity. [DJF] indicates that it does not have sexual offender treatment available for wards of the minor's age. Mr. Joe Antanucci indicates that the best option is to exhaust all other resources. If the court is to order the minor into [DJF], the commitment would have to be reviewed at the director[']s level and admittance into the program may not be guaranteed."

The report recommended one year at the Orin Allen Youth Rehabilitation Facility (OAYRF or ranch), followed by a further screening for residential treatment: "Given the limited resources available, the nature of this case and the age of the minor, a screening for the OAYRF was considered. It was determined that a one year mandatory program to include privately provided individual and group sex offender therapy could be arranged after the year at OAYRF placement in a sex offender treatment program could be pursued." As stated more clearly later in the report, this meant: "Upon completing his year at [OAYRF] the minor should be screened for a sex offender residential program. This will allow the minor time to mature in order to benefit from more intensive sex offender treatment." The report went on to propose conditions needed to carry this out, including strict curfew, drug and alcohol testing, no contact with persons under age 12 without probation officer approval, no contact with Conrad or co-participant V3, and bans on being on any school campus where he was not enrolled, gang activities, and possessing weapons or incendiary devices.

All of these materials were considered at the dispositional hearing of January 3, 2008, where counsel for Edward argued for early sex offender treatment, against vigorous opposition by the People, who urged DJF.

The court rendered this detailed oral ruling: "This is a very frightening young man before me. [A]ccording to the CSF report . . . , he sexually abused his three-year old

paternal cousin when the paternal aunt found the minor lying on top of the child while the child's underpants were down, and the aunt thought he had done something wrong—we don't know that—but it certainly is a very bad circumstance.

"Furthermore, in the group home they found the minor in the bathroom with a younger foster child. He had an erection, but they think they intervened before he had any interaction.

"I think this is one of the most dangerous young men I've had before me in a long time. He's had a terrible history. There's no doubt about it. But—but I consider him just absolutely dangerous.

"The shank that they made and held to the neck of the victim was a premeditated, planned attack. And this is not an easy shank to make. They had to create it.

"The victim was found with ink on his body after the offense. This young man is not appropriate for the Ranch. I don't know what Probation was thinking about. The people we send to the Ranch are not dangerous predators. They're not people that I would be fearful that are going to hurt other wards there. They're not people that I am fearful that they're going to go out in the community.

"[¶] . . . [¶] He did this terrible, terrible act that he is before the court for today, in one of our better group homes—Creative Alternative, where we send children with sexual problems where we send people to get better. That's where he victimized his victim.

"There's not a group home in this state that is secure. There's not a group home in this state that I would find would be safe for this child to be in until we somehow can change this behavior and the path that he is on.

"He has no remorse. He has no regard for the victim.

"I'm concerned about the fire-setting earlier. This does have the earmarks of a very strong indication of pedophilia in adulthood, and given his own—his behavior and what's been done to him, I am very concerned that we intervene with the strongest therapeutic and psychological help possible in a secure setting. And we simply do not

have a secure setting in this state, other than [DJF], that you cannot walk out of the door and victimize somebody else.

"Also, my concern is that he be in a setting where he is watched all the time, and we simply do not have a setting I know of [where] that can happen.

"So, unfortunately, given his age, I believe that [DJF] is the appropriate placement for him—given the danger of this young man to the community and other inmates wherever he is—and other wards.

"I find him lethally dangerous. I think he is [] predatory. He threatens people. He threatens staff. I have no other alternative, and I have considered them all.

"I've been to 35 placements in this state; there's not one that I would consider would be appropriate at this time for this young man.

"[I] have read Art Paull's assessment, who also is quite concerned about [Edward's] relatively high-risk. . . . Mr. Paull, who I have a lot of respect for, . . . usually is not quite as concerned as he was in this report about the safety and the risk. . . .

"[¶] . . . [¶] I've considered the age of the minor, which is young, and I am sorry for that.

"The circumstances and gravity of the offense committed by the minor and his previous delinquent history in other placements, with his aunt's children and other placements—I already stated what the charges were.

" [¶] . . . [¶] I have considered all local, less restrictive programs and forms of custody, and I am fully satisfied they're an inappropriate disposition at this point, and the minor can benefit from various programs provided by the Department of Juvenile Justice.

"They do have an outstanding sexual offender program, and I am going to order that he be placed in the sexual offender program.

"I find that the mental and physical condition and qualifications of the minor are such [as] to render it probable that he'll be benefited by the reformatory, educational, discipline or other treatment provided by the [DJF]."

The court made the indicated orders and findings, directing Edward "into [DJF's] sexual offender treatment program immediately," and ordering him "detained in Juvenile

Hall pending transfer to the [DJF]," with a "[section] 737 review" set for January 17, 2008.[3]

As Edward's appellate brief notes, a commitment order of January 10, 2008, is arguably at variance in that the standard print form "requests" that Edward "be considered" for sexual offender treatment, rather than "ordering" Edward into the program. This is a moot point, for our record reveals that on February 13, 2008, Edward was transported by DJF for the commitment. This came after review hearings held by the court every two weeks to inquire into delay in effecting its commitment. The delay, the record indicates, was because the Director of DJF had to review the case.

DISCUSSION

We review a commitment decision for abuse of discretion and indulge all reasonable inferences to support the court's decision. A commitment to DJF may be made in the first instance, without previous resort to less restrictive placements, and 1984 amendments to the juvenile court law reflect an increased emphasis on punishment as a tool of rehabilitation, and a concern for the safety of the public. (*In re Asean D.* (1993) 14 Cal.App.4th 467, 473.) "The court must find that [DJF] would likely benefit the ward (§ 734), and that it otherwise serves the statutory aims"; but "[n]othing bars [DJF] for section 602 wards who have received no other placement." (*In re Eddie M.* (2003) 31 Cal.4th 480, 488.) "Under section 202, juvenile proceedings are primarily 'rehabilitative' (*id.*, subd. (b)), and punishment in the form of 'retribution' is disallowed (*id.*, subd. (e)). Within these bounds, the court has broad discretion to choose probation and/or various forms of custodial confinement in order to hold juveniles accountable for their behavior, and to protect the public. [Citation.] . . . Given these aims, and absent any contrary provision, juvenile placements need not follow any particular order under section 602 . . . , including from the least to the most restrictive. [Citations.] Nor does the court necessarily abuse its discretion by ordering the most restrictive placement

[3] The court also found that "counts 1, 2 and 6 are [section] 707(b) offenses." The finding is not challenged on appeal.

before other options have been tried." (*Id.* at p. 507.) Permitted "[p]unishment" includes sanctions in the form of commitment to DJF (§ 202, subd. (e)(5)) or a treatment center like a camp or ranch (*id.*, subd. (e)(4)). A ward is minimally eligible for DJF commitment if, as here, he is at least age 11 years old and his latest offenses include one or more listed in section 707, subdivision (b). (§ 733, subds. (a) and (c).)

In determining the disposition for a ward, "the court shall consider, in addition to other relevant and material evidence, (1) the age of the minor, (2) the circumstances and gravity of the offense committed by the minor, and (3) the minor's previous delinquent history" (§ 725.5). And no ward shall be committed to DJF "unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by [DJF]" (§ 734).

Further safeguarding the need for probable benefit, a ward cannot be accepted to DJF unless the Chief Deputy Secretary for DJF "believes that the ward can be materially benefitted by the division's reformatory and educational discipline, and if the division has adequate facilities, staff, and programs to provide that care." (§ 736.) A juvenile court's order of commitment to DJF thus is often, as here, intermediate, with the court required to review the case at least every 15 days pending word of the ward's acceptance. (§ 737, subds. (a)-(b).)

Edward faults the commitment as based on "no evidence that there were any effective programs available" at DJF to meet his needs, and he cites for this the probation report statement that DJF did not consider him a suitable candidate and "did not have a sex offender treatment for wards of [his] age." This argument is misleading. The report actually stated that Edward was "screened with the [DJF] intake representative. The minor was not found suitable to a commitment due to [his] age and lack of maturity. [DJF] indicates that it does not have sexual offender treatment available for wards of the minor's age. Mr. Joe Antanucci indicates that the best option is to exhaust all other resources. If the court is to order the minor into [DJF], the commitment would have to be

reviewed at the director[']s level and admittance into the program may not be guaranteed."

By ignoring the part that DJF might nevertheless approve the commitment after review "at the director[']s level," and the phrase that something short of DJF was a "best option," Edward makes it sound as if DJF was flatly inappropriate, when in the end, it was not. The case ultimately was reviewed at the director's level, and Edward was accepted. Acceptance statutorily implied that the director found that Edward could be materially benefitted by DJF's reformatory and educational discipline, and that there were adequate facilities, staff, and programs to provide that care (§ 736), and the usual presumption that duty was regularly preformed (Evid. Code, § 664) is not rebutted on this record. The court also met with DJF "every single month" and was familiar with what it called an "outstanding sexual offender program" at DJF and, by contrast, said it was "very familiar" with the ranch program for younger wards but found that program "not at all appropriate" for Edward.

Edward further charges that the court's comments show that its "primary and virtually sole concern was protection of the public," rather than probable benefit, and that the court "failed to consider" what the United States Supreme Court has identified, in holding the death penalty cruel and unusual punishment for juveniles under age 18, as a juvenile's immaturity and undeveloped sense of responsibility, greater vulnerability, and less well-formed character (citing *Roper v. Simmons* (2005) 543 U.S. 551, 568-570). Nonsense. This was a commitment to DJF, not a death sentence, and was imposed by an experienced juvenile court judge who obviously knew the purposes and limitations of the law, and the characteristics of youthful versus adult offenders.

Notably, Edward does not address the central problem in this case, which was that the facts show him to be a cold, precocious and predatory sex offender who was not only likely to, but in fact did, harm other wards, not just the public—and one who all agreed needed immediate sex-offender therapy. He was inappropriate for any community-based program, and was assessed but rejected as ineligible, due to the seriousness of his crimes, for residential treatment—what the Paull report had recommended in lieu of DJF. The

trial judge had this properly in mind and stated, without contradiction, that she had visited 35 placements and that none of them would provide the security and supervision needed to protect other wards from Edward. She lamented: "I am very sad to do this—but there is simply no other alternative, and I am not going to release this young man into a situation where he could ruin somebody else's life as he's ruined several people up to now."

Edward does not address how the court was to overcome that problem. He advocates the probation report proposal to place him at the ranch, but ignores flaws in that option. First, of course, was the lack of adequate supervision to protect other wards. Second, it envisioned just one year at the ranch, which was a limited time of security to be followed, it seems, by probation conditions and supervision. Third, Edward would evidently receive no sex-offender treatment for that first year. Fourth, the idea was that after a year at the ranch, he would be reassessed for residential treatment and, hopefully, found appropriate, but having just been assessed and rejected for that very option, this was a risky gamble. The court was not bound by the report recommendation for a less restrictive option. (*In re Martin L.* (1986) 187 Cal.App.3d 534, 544.)

Edward does not demonstrate abuse of discretion in the court opting for the security, program and other benefits of DJF.

DISPOSITION

The judgment is affirmed.

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Richman, J.

We concur:

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Kline, P.J.

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Lambden, J.